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In the Supreme Court of the United States

OCTOBER TERM, 1982

FEDERAL LABOR RELATIONS AUTHORITY,
PETITIONER

v.

DIVISION OF MILITARY AND NAVAL AFFAIRS
STATE OF NEW YORK, AND DEPARTMENT OF
DEFENSE

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

STEVEN H. SVARTZ*
Acting Solicitor
ELLEN STERN
Attorney
Federal Labor Relations Authority
Washington, D.C. 20424
202-382-0785

**Counsel of Record*

QUESTION PRESENTED

Whether the Federal Labor Relations Authority reasonably construed the Federal Service Labor-Management Relations Statute (5 U.S.C. (Supp. V) 7101 *et seq.*) and concluded that employees who are on official (paid) time under 5 U.S.C. (Supp. V) 7131(a), while representing an exclusive representative in the negotiation of a collective bargaining agreement, are entitled to payment from their employing agency for travel expenses and per diem.*

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* All parties in the United States Court of Appeals for the Second Circuit are listed in the caption. The National Treasury Employees Union was granted leave to participate as amici curiae before the Court of Appeals.

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and the American Federation of Government Employees, AFL-CIO, were

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In the Supreme Court of the United States

OCTOBER TERM, 1982

FEDERAL LABOR RELATIONS AUTHORITY,
PETITIONER,

v.

DIVISION OF MILITARY AND NAVAL AFFAIRS,
STATE OF NEW YORK, AND DEPARTMENT OF DEFENSE

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The Federal Labor Relations Authority petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in this case.[1]

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-12a) is reported at 683 F.2d 45 (2d Cir. 1982). The decision and order of the Federal Labor Relations Authority (App. D, *infra*, 17a-23a) is reported at 7 F.L.R.A. No. 69 (December 29, 1981).

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1982 (App. B, *infra*, 13a-14a). A timely petition for rehearing and suggestion for rehearing *en banc* was denied on September 17, 1982 (App. C, *infra* at

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[1] The caption below reads *Division of Military and Naval Affairs, State of New York, and Department of Defense* v. *Federal Labor Relations Authority*.

15a-16a), and the petition for writ of certiorari has been filed within 90 days of the denial of reconsideration. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[2]

STATUTES INVOLVED

This case involves Title VII of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978), which is referred to as the Federal Service Labor-Management Relations Statute, 5 U.S.C. (Supp. V) 7101 *et seq.* (hereinafter the "Labor-Management Statute"). Of particular relevance to this case are sections 7131(a) and 7101(a) of the Labor-Management Statute.

5 U.S.C. (Supp V) 7131 provides:

> (a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.
>
> (b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a non-duty status.
>
> (c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such

[2] The Solicitor General has authorized the filing of this petition.

purpose during the time the employee otherwise would be in a duty status.

(d) Except as provided in the preceding subsections of this section—

(1) any employee representing an exclusive representative, or

(2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative,

shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

5 U.S.C. (Supp. V) 7101(a) provides:

(a) The Congress finds that—

(1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—

(A) safeguards the public interest,

(B) contributes to the effective conduct of public business, and

(C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and

(2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.

Therefore, labor organizations and collective bargaining in the civil service are in the publilc interest.

5 U.S.C. (Supp. V) 5702(a) provides:

> Under regulations prescribed under section 5707 of this title, an employee while traveling on official business away from his designated post of duty, or in the case of an individual described under section 5703 of this title, his home or regular place of business, is entitled to (1) a per diem allowance for travel inside the continental United States at a rate not to exceed $50, and (2) a per diem allowance for travel outside the continental United States, that may not exceed the rate established by the President, or his designee, for each locality where travel is to be performed. For travel consuming less than a full day, such rate may be allocated proportionately.

STATEMENT OF THE CASE

1. The Labor-Management Statute governs labor-management relations in the federal service. The Federal Labor Relations Authority (hereinafter "Authority" or "FLRA") was established as an independent agency in the executive branch, to administer the Labor-Management Statute, provide leadership in establishing policies and guidance thereunder, and ensure compliance with the statutory rights and obligations of federal employees, labor organizations which represent such employees, and federal agencies. *See* 5 U.S.C. (Supp. V) 7105.[3]

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[3] Congress found that the statutory protection of collective bargaining and employee participation through labor organizations safeguards the public interest, contributes to the effective conduct of public business, and facilitates and encourages the amicable settlements of employee-employer disputes involving conditions of employment. 5 U.S.C. (Supp. V) 7101(a). Further, Congress found that labor organizations and collective bargaining in the civil service are in the public interest. *Id.* Consistent with these findings, the Labor-Management Statute requires an agency to accord exclusive recognition to a union

Congress has entrusted the Authority with, among other things, the power to determine appropriate units for union representation, conduct representation elections, decide issues relating to the statutory duty to bargain in good faith, resolve unfair labor practice complaints, rule on exceptions to arbitrators' awards, and take such other actions as are necessary and appropriate to administer effectively the provisions of the Labor-Management Statute. 5 U.S.C. (Supp. V) 7105(a)(2)(A), (B), (E), (G), and (I), respectively.[4]

The Authority is empowered to issue orders against unfair labor practices (5 U.S.C. (Supp. V) 7118) and to seek enforcement of those orders in appropriate United

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elected as the representative by employees in an appropriate bargaining unit as determined by the Authority. 5 U.S.C. (Supp. V) 7111(a). A union which has been accorded exclusive recognition represents, and is entitled to act for and negotiate collective bargaining agreements covering all employees in the unit. 5 U.S.C. (Supp. V) 7114(a)(1). The union must represent the interests of all employees in the unit without discrimination and without regard to union membership. *Id.*

After a union has been accorded exclusive recognition, the agency and union have a duty to meet and negotiate in good faith for the purpose of arriving at a collective bargaining agreement. 5 U.S.C. (Supp. V) 7114(a)(4). This duty includes the parties' obligation to be represented at negotiations by authorized representatives prepared to discuss and negotiate on any condition of employment, and to meet at reasonable times and convenient places as frequently as may be necessary. 5 U.S.C. (Supp. V) 7114(b)(2) and (3). Moreover, an agency is required to grant official (paid) time to an employee representing an exclusive representative in the negotiation of a collective bargaining agreement. 5 U.S.C. (Supp. V) 7131(a).

[4] Prior to creation of the Authority and enactment of the Labor-Management Statute, labor-management relations in the federal service had been governed by Executive orders. *See* Executive Order 10988, 3 C.F.R. 521 (1959-1963 Compilation) and Executive Order 11491, as amended, *reprinted in* 5 U.S.C. (Supp. V) 7101 note at 312.

States courts of appeals. 5 U.S.C. (Supp. V) 7123(b).[5] Persons, including federal agencies and unions, aggrieved by final orders of the Authority may seek judicial review in the courts of appeals. 5 U.S.C. (Supp. V) 7123(a).

2. Collective bargaining negotiation sessions between Division of Military and Naval Affairs, State of New York (hereinafter "New York National Guard" or "agency") and the New York State Council of Association of Civilian Technicians, Inc. (hereinafter "union"), representing a bargaining unit of National Guard Technicians, were conducted in Albany, New York.[6] The bargaining unit employees representing the union, who by law were on official (paid) time, incurred travel and per diem expenses because their duty stations were outside Albany and they were required to travel to the Albany bargaining site. Of the management employee representatives, also on official time, only the agency's principal negotiator incurred similar travel and per diem expenses, because he was the only one whose duty station was outside Albany (App. A, *infra*, 3a). The agency paid the expenses of its own negotiator but refused to pay the expenses of the union representatives (*id.*). The union filed unfair labor practice charges against the agency with the Authority. The Authority

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[5] The Labor-Management Statute proscribes certain conduct by agencies or unions as unfair labor practices. For example, an agency may not "interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this [Labor-Management Statute]" (5 U.S.C. (Supp. V) 7116(a)(1)) or "otherwise fail or refuse to comply with any provision of this [Labor-Management Statute]" (5 U.S.C. (Supp. V) 7116(a)(8)).

[6] Technicians are employed, pursuant to the National Guard Technicians Act of 1968, Pub. L. No. 90-486, 32 U.S.C. 709 (1976), in full-time civilian positions by the National Guard. In their federal civilian capacity, such technicians are included within the coverage of the Labor-Management Statute. 5 U.S.C. (Supp. V) 7103(a)(2) and (3).

found that the agency had committed unfair labor practices by refusing to authorize such payments. (App. D, *infra*, 19a-21a.)

In so finding, the Authority explicitly relied upon and adopted its Interpretation and Guidance (hereinafter "Interpretation") issued on December 19, 1979 (2 F.L.R.A. No. 31; App. E, *infra*, 24a-36a). There, the Authority concluded that employees on official time under 5 U.S.C. (Supp. V) 7131(a), while representing a union in the negotiation of a collective bargaining agreement with an agency, are entitled to payment from that agency for their travel expenses and per diem.

In support of its conclusion, the Authority specifically noted Congress' express rejection of attempts to incorporate the restrictive official time policies of Executive Order 11491, as amended, *reprinted in* 5 U.S.C. (Supp. V) 7101 note at 312, under which payment of travel expenses and per diem was not authorized, into the Labor-Management Statute (App. E, *infra*, 31a n.6). In this regard, while acknowledging that neither the language or the legislative history of the Labor-Management Statute expressly adverts to payment of travel expenses or per diem, the Authority pointed out that the official time provisions under 5 U.S.C. (Supp. V) 7131(a) are completely different from those of the rejected Senate bill, which sought to maintain the language of the official time provisions under the Executive Order. Thus, unlike under the Executive Order which strictly limited the amount of official time which might be authorized for negotiation activities by employee union representatives, section 7131(a) contains no such limitation. As explained by the House Report, such employee is on "paid time" and entitled to his or her usual compensation. H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 58 (1978) (App. E, *infra*, 31a). The Authority further explained that unlike under the Execu-

tive Order, the encouragement of collective bargaining is a stated purpose of the Labor-Management Statute (*id.*).

Additionally, the Authority emphasized that, under the Labor-Management Statute, employees participating in negotiation activities pursuant to 5 U.S.C. (Supp. V) 7131(a) are engaged on official government business and are therefore authorized payment of travel and per diem expenses, under 5 U.S.C. (Supp. V) 5701 *et seq.* (App. E, *infra*, 31a-32a). The Authority concluded that its determination that such employees are engaged on "official business for the Government" is compelled because of Congress' specific finding that collective bargaining is in the public interest and contributes to the effective conduct of public business, and from the statutory requirement that parties conduct their negotiations in good faith, including meeting at reasonable times and convenient places as frequently as may be necessary. *See* 5 U.S.C. (Supp. V) 7101(a), 7114, 7116(a)(5) and (b)(5) (App. E, *infra*, 32a).

Moreover, as explained by the Authority, the payment of travel expenses and per diem also implements Congress' intent more nearly to equate the status of union and management negotiators. Reducing this inequality facilitates more effective union representation at the bargaining table, which in turn encourages collective bargaining and contributes to the effective conduct of public business. 5 U.S.C. (Supp. V) 7101(a). In this connection, the Authority stated that agencies uniformly pay travel expenses and per diem for management negotiators, and Congress indicated in the legislative history that similar prerogatives are to be accorded employees serving as union negotiators under 5 U.S.C. (Supp. V) 7131(a).[7] (App. E, *infra*, 32a-33a.)

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[7] The Authority quoted the following statement of Congressman Clay (124 Cong. Rec. 29188 (1978)):

Finally, as the Authority pointed out, this conclusion is consistent with its previous interpretation of identical language in section 7131(c) which entitles employees on official time in Authority proceedings to travel and per diem expenses. 5 C.F.R. 2429.13 (1982). (App. E, *infra*, 33a-34a.)

In view of the foregoing, the Authority ordered the agency to cease and desist from failing or refusing to provide payment of properly documented travel and per diem expenses to its employees participating on official time in collective bargaining under section 7131(a) of the Labor-Management Statute as duly designated representatives of the union, and to take appropriate affirmative action (App. D, *infra* at 20a-21a).

3. The court of appeals, in a 2-1 decision, denied enforcement of the Authority's order. The majority opinion stated that the court was not "inhibited" in its review of the Authority's decision "by the deference normally due the Authority's construction of its enabling statute" because the decision "rests on an interpretation of 'official business' in 5 U.S.C. § 5702(a) [which is] administered by the General Services Administration" (App. A, *infra* at 5a). The majority thus declined to defer to the Authority's determination that collective bargaining on "official (paid) time," under the Labor-Management Statute, constitutes official government business, entitling employee negotiators, including those employees representing the union, to travel

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Section 7132(b) of the Udall compromise bars the use of official time for conducting the internal business of a labor organization.... Activities that involve labor-management contacts are not included in this section.... Title VII imposes heavy responsibilities on labor organizations and on agency management. These organizations should be allowed official time to carry out their statutory representational activities *just as* management uses official time to carry out its responsibilities. (Emphasis in Interpretation.)

(Id.)

expenses and per diem (*id.*). The majority's decision was based in large part on its rejection of the Authority's determination that Congress, in enacting the Labor-Management Statute, expressly found that collective bargaining is in the public interest. In that regard, contrary to the Authority, the majority concluded: "Congress did not find that collective bargaining furthers the public interest. Congress found that the *statutory protection* of collective bargaining furthers the public interest" (*id.* at 6a). The majority thus reasoned that "Congress did not endorse collective bargaining as in the public interest [but] ... merely stated that collective bargaining was not against the public interest and did not hamper public business" (*id.*).

The majority also found it appropriate to rely on private sector practice regarding payment of travel and per diem expenses to union negotiators as a basis for its decision in this case, noting "that the expense the [Authority] would impose as routine upon the federal government is viewed as an extraordinary remedy by the National Labor Relations Board" (*id.* at 7a).[8]

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[8] In a separate dissenting opinion, Circuit Judge Oakes concluded that the majority's failure to defer to the Authority was based on the erroneous premise that the Authority's decision rests on an interpretation of another agency's statute (*id.* at 8a). In that regard, the dissenting opinion stated (*id.* at 10a n.2):

> A fair reading of the Interpretation and Guidance is that the [Authority] made the determination whether employees on official time are entitled to payments for travel and per diem on the basis of section 7131(a) and Title VII [the Labor-Management Statute], and then concluded that employees participating in negotiation activities under that section are on "official business" and entitled to the payment of travel and per diem under 5 U.S.C. § 5701 *et seq.*, which simply operates to provide the authorization to expend funds.

REASONS FOR GRANTING THE PETITION

In *Bureau of Alcohol, Tobacco and Firearms* v. *Federal Labor Relations Authority and National Treasury Employees Union*, petition for cert. pending No. 82-799 (filed on November 10, 1982), the Solicitor General, on behalf of the Bureau of Alcohol, Tobacco and Firearms, has sought review of a decision of the Ninth Circuit involving precisely the same issue raised in the petition in the instant case.[9] The Ninth Circuit, in a unanimous

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On the merits, the dissent concluded that "while the position of the majority here has some strength, the [Authority] decision is 'reasonably defensible' and should be upheld" (*id.* at 11a). The dissenting opinion cited the following as support for the Authority's decision: (1) "Congress' reject[ion] [of] the limitations on official time contained in Exec. Order No. 11491, as amended, § 20" (*id.*); (2) Congress' express statement in 5 U.S.C. (Supp. V) 7101(a) "that collective bargaining 'contributes to the effective conduct of public business and that 'labor organizations and collective bargaining in the civil service are in the public interest. (*id.*); (3) Congress intent "to reduce the unequal status of union and management" (*id.* at 12a) and; (4) Section 7131(a)'s provision limiting the number of employee union representatives entitled to official time (*id.*). Finally, the dissent found the "National Labor Relations Act policy in respect to private employees [to be] irrelevant" (*id.*).

[9] In both cases the courts of appeals were called upon to review the Authority's determination, as explicated in its Interpretation and Guidance (App. E, *infra* at 24a-36a), that employees, on official (paid) time under 5 U.S.C. (Supp. V) 7131(a), while representing an exclusive representative in collective bargaining negotiations, are entitled to payments from their employing agency for travel expenses and per diem.

This same issue was decided adversely to the Authority by the Eighth Circuit in a 2-1 decision, with a separate dissenting opinion, in *United States Department of Agriculture* v. *Federal Labor Relations Authority*, 111 L.R.R.M. 2007 (Aug. 9, 1982), rehearing denied (8th Cir., Sept. 14, 1982). Other cases involving the same issue are also pending in the Eleventh and District of Columbia Circuits. *See, e.g., Florida National Guard* v. *FLRA*, No. 81-5466 (11th Cir., argued Sept. 1, 1982); *Bureau of*

decision, enforced the Authority's order and denied the petition for review filed by the Bureau of Alcohol, Tobacco and Firearms.[10]

In a memorandum filed on December 13, 1982, in response to the petition for a writ of certiorari in that case, the Authority urged that the Ninth Circuit's decision was correctly decided. However, in view of the conflict in the circuits and the importance and recurrent nature of the issue, the Authority indicated that it did not oppose granting of the petition.

CONCLUSION

The instant petition for a writ of certiorari should be held and disposed of in light of the disposition of *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, No. 82-799.

Respectfully submitted,

STEVEN, H. SVARTZ
Acting Solicitor

ELLEN STERN
Attorney

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the Mint and United States Customs Service v. *FLRA*, Nos. 82-1194, 82-1195 (D.C. Cir. filed Feb. 24, 1982).

[10] The Ninth Circuit's decision in *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA* is reported at 672 F.2d 732 (1982). In its opinion in that case, the Ninth Circuit concluded (672 F.2d at 738):

> The FLRA's Interpretation and Guidance is reasoned and supportable, and therefore will be given deference by this Court. The FLRA, acting in its own area of expertise, has interpreted the relevant language of Title VII [the Labor-Management Statute] in a clearly defensible manner, and we are neither permitted nor inclined to substitute a different judgment.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1180-August Term, 1981

(Argued May 24, 1982 Decided June 28, 1982)

Docket No. 82-4036

DIVISION OF MILITARY AND NAVAL AFFAIRS, STATE OF NEW YORK, AND DEPARTMENT OF DEFENSE, PETITIONERS,

—AGAINST—

FEDERAL LABOR RELATIONS AUTHORITY, RESPONDENT

BEFORE: LUMBARD, OAKES AND PIERCE, *Circuit Judges*

The Authority charged the New York National Guard with an unfair labor practice because the Guard refused to pay the per diem and travel expenses incurred by representatives of civilian employees engaged in collective bargaining with the Guard. The Guard petitions for review, and the Authority applies for enforcement.

Review granted; enforcement denied. Judge Oakes dissents in a separate opinion.

DOUGLAS LETTER, Attorney, Civil Division, Department of Justice, Washington, D.C. (J. Paul

McGrath, Assistant Attorney General, Washington, D.C., William Kanter, Attorney, of counsel), *for Petitioners.*

ELLEN STERN, Attorney, Federal Labor Relations Authority, Washington, D.C. (Elizabeth Medaglia, Acting Solicitor, Washington, D.C., of counsel), *for Respondent.*

ROBERT M. TOBIAS, General Counsel, National Treasury Employees Union, Washington, D.C., John F. Bufe, Deputy General Counsel, William F. White, Associate General Counsel, Washington, D.C., *for Amicus Curiae National Treasury Employees Union in Support of Respondent FLRA.*

MARK D. ROTH, Assistant General Counsel, American Federation of Government Employees, AFL-CIO, Washington, D.C., James R. Rosa, General Counsel, Washington, D.C., *for Amicus Curiae American Federation of Government Employees, AFL-CIO in Support of Respondent FLRA.*

LUMBARD, *Circuit Judge:*

The New York National Guard[1] petitions for review of an order of the Federal Labor Relations Authority (FLRA) which directs the Guard to pay the per diem and travel expenses incurred by representatives of civilian employees in collective bargaining with the Guard. The FLRA applies for enforcement of the order. We grant the petition for review and deny enforcement. We find no authority to support the FLRA's command that the federal government, alone among

[1] The New York National Guard, although a state militia, is federally administered under Title 32 of the United States Code by the National Guard Bureau in the Pentagon, 10 U.S.C. § 3015 (1976). Therefore a division of the Department of Defense is petitioner here as the administrator of the New York National Guard.

federally-regulated employers, must pay expenses incurred by its adversaries across the bargaining table.

The parties agree on the facts. The National Guard employs some 46,700 civilian technicians across the country to meet the day-to-day administrative, training and logistical needs of the Guard.[2] Approximately three-quarters of the technicians are represented by various unions, including the New York State Council of Association of Civilian Technicians, Inc. On two days in November 1979, and one day in April 1980, five members of the New York State Council represented their union in contract negotiations with the New York National Guard in Albany, New York. The technicians incurred travel and per diem expenses because they were not stationed in Albany. The Guard's principal negotiator incurred similar expenses. The Guard paid the expenses of its own negotiator but pursuant to its past practice declined to pay the expenses of the Union representatives. The Union filed unfair labor practice charges in spring of 1980 with the FLRA, and in December 1981 the FLRA found that the Union representatives were entitled to their travel/per diem costs under a previously issued FLRA Interpretation and Guidance, 2 FLRA No. 31 (1979).

The FLRA's Interpretation was not a regulation promulgated under 5 U.S.C. § 7134, but rather an informal ruling issued under 5 U.S.C. § 7105(a)(1). The FLRA in its Interpretation noted that government employees are entitled to reimbursement of travel and per diem expenses incurred on *official business:*

> (a) Under regulations prescribed under § 5707 of this title, an employee while traveling on *official business* away from his designated post of duty . . . is entitled to . . . a per diem allowance. . . .

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[2] National Guard technicians are federal employees. 32 U.S.C. § 709(d) (1976).

5 U.S.C. § 5702(a) (1976) (emphasis added).

The FLRA also noted that the Civil Service Reform Act of 1978 (CSRA) provided that government employees would draw their salaries for time spent in collective bargaining by designating such time as *official time:*

> (a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized *official time* for such purposes.

P.L. 95-454, 95th Cong., 2d Sess. § 701, 92 Stat. 1111, 1214 (1978), 5 U.S.C. § 7131(a)(Supp. III 1979) (emphasis added).

Government employees had previously conducted collective bargaining under Executive Order 11491 (1969), 1969 U.S. Code Cong. & Ad. News 2948, which did not entitle employees to pay for time spent in collective bargaining. The FLRA concluded that when Congress expanded "official time" to compensate employees for bargaining time, Congress also meant to expand "official business" to compensate employee bargainers for travel and per diem expenses. The FLRA supported its conclusion by noting that Congress in the CSRA had declared that collective bargaining furthered the *public business:*

> (a) The Congress finds that—(1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—
>
> (A) safeguards the public interest,
>
> (B) contributes to the effective conduct of *public business* . . .

P.L. 95-454, 95th Cong., 2d Sess. § 701, 92 Stat. 1111, 1192 (1978), 5 U.S.C. § 7101(a) (Supp. III 1979) (emphasis added).

The FLRA held that collective bargaining done on official time, which contributed to the effective conduct of public business, was "official business" within the meaning of 5 U.S.C. § 5702(a) and therefore employees engaged in collective bargaining were entitled to per diem. The National Guard, one of the first federal employers to suffer the consequences of the FLRA's Interpretation & Guidance,[3] argues the FLRA incorrectly interpreted the relevant statutes. We agree.

Our review of the FLRA's decision is not inhibited by the deference normally due the Authority's construction of its enabling statute. *See Internal Revenue Service v. Federal Labor Relations Authority*, 671 F.2d 560, 563 (D.C. Cir. 1982). Here the FLRA's decision rests on an interpretation of "official business" in 5 U.S.C. § 5702 (a)—a section not part of the CSRA, which created the FLRA, but instead part of a subchapter administered by the General Service Administration. 5 § 5707. No great deference is due an agency interpretation of another agency's statute. *See New Jersey Air Nat'l Guard v. Federal Labor Relations Authority*, 677 F.2d 276, at 281 n.6 (3rd Cir. 1982).

We are cited to no legislative history supporting the FLRA's conclusion that collective bargaining on "official time" is also "official business." The FLRA relies instead on the Congressional finding that collective bargaining is in the public interest. Such a general declara-

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[3] Several other federal employers have challenged the FLRA's Interpretation & Guidance in similar cases before courts of appeals: *Bureau of the Mint v. Federal Labor Relations Authority*, 81-1194; 82-1195 (D.C. Cir.); *Department of Agriculture v. FLRA*, 81-1948 (8th Cir.); *Florida National Guard v. FLRA*, 81-5466 (11th Cir.).

The Ninth Circuit upheld the FLRA's determination that federal employers must pay the per diem and travel expenses of federal employee bargainers. *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 672 F.2d 732, 737-38 (9th Cir. 1982). We disagree.

tion of policy is "too thin a reed" to support a substantive ruling which would cost the federal government substantial sums of money in per diem and travel expenses. *Cf. Pennhurst State School v. Halderman*, 451 U.S. 1, 19 (1981) (statute's "bill of rights" for the handicapped does not create affirmative obligations on the states to treat the handicapped).

Moreover, the FLRA's extrapolation goes too far. Congress did not find that collective bargaining furthers the public interest. Congress found that *statutory protection* of collective bargaining furthers the public interest, *see* 5 U.S.C. § 7101(a) *and* CSRA § 3(10), 92 Stat. 1111, 1113 (1978). The import of the distinction becomes clear upon consideration of the legislative history of CSRA § 3(10), because the history indicates that Congress did not endorse collective bargaining as in the public interest. Congress merely stated that collective bargaining was not against the public interest and did not hamper public business:

> The conference substitute ... adopts the Senate language which states as one of the policies of the United States that the right of Federal employees to ... bargain collectively ... *with full regard for the public interest and the effectual conduct of public business*, should be specifically recognized in statute."

Conference Report, H.R. Rep. No. 1717, 95th Cong. 2d Sess. 127 (1978), 1978 U.S. Code Cong. & Ad. News 2723, 2860. The same sentiments were expressed in the Senate Report:

> [Section 3(10)] states findings of Congress that the protection of the right of employees to ... bargain collectively ... *can be accomplished with full regard for the public interest* and contributes to the effective conduct of public business.

S. Rep. No. 969, 95th Cong. 1st Sess. 97 (1977), 1978 U.S. Code Cong. & Ad. News 2723, 2819 (emphasis added).

The reports indicate that Congress did not give collective bargaining the blanket endorsement that FLRA claims to have found in the statute. Moreover, the endorsement of collective bargaining was no more than the endorsement previously contained in Executive Order 11491. *See* S. Rep. No. 969, *supra*, at 17, 1978 U.S. Code Cong. & Ad. News at 2739.

Finally, though neither side saw fit to refer us to comparable practice in the private sector, we think it appropriate to note that the expense the FLRA would impose as routine upon the federal government is viewed as an extraordinary remedy by the National Labor Relations Board (NLRB). Only a decade ago, the NLRB held that it was without power to order a private employer to pay the costs of a breakdown in collective bargaining. *Ex-Cell-O Corp.*, 185 N.L.R.B. 107 (1970). The D.C. Circuit remanded on the ground that the NLRB did have such power, *International Union v. National Labor Relations Board*, 449 F.2d 1046 (D.C. Cir. 1971) (per curiam), but that power has been exercised to compel payment of employee bargainers' per diem and travel expenses only as an extraordinary remedy for the employers' failure to bargain in good faith. *Mariott In-Flite Services*, 258 N.L.R.B. No. 99 (Sep. 30, 1981); *J.P. Stevens & Co., Inc.*, 239 N.L.R.B. 738, 773 (1978). Far from seeking a remedy for bad faith bargaining, the FLRA would hold that the federal government must always pay the bargaining costs of its adversaries. One of the obvious and universal purposes of collecting union dues is to pay for the expenses of such important activities as collective bargaining with the employer. Under all the circumstances we cannot believe that Congress meant the government to assume such an unusual burden, so different from any accepted practice in dealings between employers and employees, absent a clear and specific provision to that effect.

Petition granted; enforcement denied.

OAKES, *Circuit Judge* (dissenting)

I dissent.

The FLRA found that employees on official time under 5 U.S.C. § 7131(a) while representing their union in negotiating a collective bargaining agreement with their employing agency are entitled under 5 U.S.C. § 5702(a) to payments from that agency for their travel and per diem expenses. This construction is entitled to considerable deference. *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 672 F.2d 732, 735 (9th Cir. 1982) (upholding the FLRA's interpretation of section 7131(a) on the same issue as in this case). As the District of Columbia Circuit recently stated,

> although we do not regard the agency argument to be without force, we have no doubt that the ruling of the FLRA should be upheld against it. It is the FLRA, not this court, that has been entrusted by Congress with broad powers to administer Title VII and to establish policies and provide guidance thereunder. . . . If the FLRA's construction of the statute is reasonably defensible, we are not free to reject it merely because we might decide differently if confronted with the question in the first instance. *See Ford Motor Co. v. NLRB*, 441 U.S. 488 . . . (1979).

Department of Defense v. FLRA, 659 F.2d 1140, 1162 n.121 (D.C. Cir. 1981) (discussing the negotiability of certain union proposals).

Judge Lumbard's opinion does not defer to the FLRA because, it says, the FLRA's decision "rests on an interpretation of 'official business' in 5 U.S.C. § 5702(a)," which is administered by the General Services Administration, not the FLRA. This is simply not so. "Interpretation" of "official business" in section 5702(a) is at most secondarily involved. An employee travelling on official business is entitled under that statute to a per diem allowance. The FLRA simply made

one brief reference to that statute in interpreting a provision of Title VII, 5 U.S.C. § 7131(a), authorizing "official time" for employees "representing an exclusive representative in the negotiation of a collective bargaining agreement."[1] The FLRA's Interpretation and Guidance, 2 F.L.R.A. 265 (1979), was issued pursuant to 5 U.S.C. § 7105(a)(1), requiring the FLRA to "provide leadership in establishing policies and guidance" so as to carry out the purpose of Title VII. It was issued after due notice, 44 Fed. Reg. 42778 (July 20, 1979), and hearing, *id.* at 76581 (Dec. 27, 1979). The FLRA ad-

[1] 5 U.S.C. § 7131 reads as follows:

Official time.

(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

(b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a nonduty status.

(c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.

(d) Except as provided in the preceding subsections of this section—

(1) any employee representing an exclusive representative, or

(2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative,

shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

dressed two questions in the Interpretation and Guidance:

> 1) Whether employees who are on official time under section 7131 of the Statute while representing an exclusive representative in the negotiation of a collective bargaining agreement are entitled to payments from agencies for their travel and per diem expenses.
>
> 2) Whether the official time provisions of section 7131(a) of the Statute encompass all negotiations between an exclusive representative and an agency, regardless of whether such negotiations pertain to the negotiation or renegotiation of a basic collective bargaining agreement.

Virtually the entire Interpretation is devoted to the legislative history of Title VII and section 7131. Only a single paragraph in the eight page Interpretation refers to 5 U.S.C. § 5701 *et seq.*[2]

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[2] The full paragraph on the fifth page of the Interpretation, 2 F.L.R.A. at 269, reads:

> Neither the Statute, nor it legislative history, expressly adverts to the payment of travel expenses or per diem during participation in these negotiation activities. However, it is well established that such expenses are authorized when an employee "is engaged on official business for the Government" (Chapter 57, Subchapter I—*Travel and Subsistence Expenses; Mileage Allowances*, 5 U.S.C. § 5701, *et seq.*). As already mentioned, Congress, in adopting the Statute, specifically found in section 7101(a) that collective bargaining "contributes to the effective conduct of public business," and that "collective bargaining in the civil service [is] in the public interest." Further, Congress expressly mandated in section 7114 and 7116(a)(5) and (b)(5) that such negotiations be conducted in good faith by the parties involved (92 Stat. 1202, 1204). Thus, an employee, while negotiating a collective bargaining agreement as a union representative and while on paid time entitled to his or her usual compensation and not in a leave status, is clearly engaged on "official business for the Government."

A fair reading of the Interpretation and Guidance is that the FLRA made the determination whether employees on official

On the merits, while the position of the majority here has some strength, the FLRA's decision is "reasonably defensible" and should be upheld. In enacting section 7131(a) Congress rejected the limitations on official time contained in Exec. Order No. 11491, as amended, § 20 ("Employees who represent a recognized labor organization shall not be on official time when negotiating an agreement with agency management, except to the extent that the negotiating parties agree to other arrangements . . ."). Congress thus determined that federal employees, like management representatives, should receive their usual compensation while negotiating collective bargaining agreements—certainly not an unreasonable position once Congress decided that collective bargaining in respect to government employees is desirable and in the public interest. In light of this complete reversal of past practice regarding official time, the past practice of not paying employees for travel and per diem expenses incurred in collective bargaining is at best a frail basis for challenging the FLRA's interpretation.

I think the FLRA could reasonably conclude that Congress intended to change the past practice. Unlike the executive order, 5 U.S.C. § 7101 explicitly states that collective bargaining "contributes to the effective conduct of public business," and that "labor organizations and collective bargaining in the civil service are in the public interest." Since this language indicates that employees on "official time" within the meaning of section 7131(a) are conducting "public business" which is in the "public interest," it seems to follow that they are on

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time are entitled to payments for travel and per diem on the basis of section 7131(a) and Title VII, and then concluded that employees participating in negotiation activities under that section are on "official business' and entitled to the payment of travel and per diem under 5 U.S.C. § 5701 *et seq.*, which simply operates to provide the authorization to expend funds.

"official business" when they are negotiating. In that event, 5 U.S.C. § 5702 authorizes payment of travel and per diem expenses.

Further support for the Authority's interpretation is found in the intent of Congress to reduce the unequal status of union and management, and in section 7131(a)'s provision that the number of union representatives entitled to official time "shall not exceed the number of individuals designated as representing the agency for such purposes." This last provision enables the agencies to limit their expenditure of funds on behalf of union representatives simply by reducing the number of management representatives. The National Labor Relations Act policy in respect to private employees is irrelevant. In short, like the Ninth Circuit in *Bureau of Alcohol, Tobacco and Firearms, supra*, I do not find the FLRA's interpretation either arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). I would grant enforcement.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

#82-4036

Filed: June 28, 1982

DIVISION OF MILITARY AND NAVAL AFFAIRS,
STATE OF NEW YORK, AND
DEPARTMENT OF DEFENSE, PETITIONERS,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
RESPONDENT.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of June one thousand nine hundred and eighty-two

Present:

HON. J. EDWARD LUMBARD
HON. JAMES L. OAKES
HON. LAWRENCE W. PIERCE
Circuit Judges,

Petition for review of an order of the Federal Labor Relations Authority,

This cause came to be heard on the record of the Federal Labor Relations Authority and was argued by counsel,

UPON CONSIDERATION THEREOF, it is hereby ordered, adjudged, and decreed that the petition for review by and it hereby is granted and enforcement denied in accordance with the opinion of this court with costs to be taxed against the respondent.

A. DANIEL FUSARO,
Clerk

/s/ ARTHUR HELLER,
Deputy Clerk

A True Copy
A. DANIEL FUSARO, *Clerk*

/s/ FRANCIS X. GINDHART
Chief Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 82-4036

Filed: September 17, 1982

DIVISION OF MILITARY AND NAVAL AFFAIRS, STATE OF NEW YORK, AND DEPARTMENT OF DEFENSE, PETITIONERS,

v.

FEDERAL LABOR RELATIONS AUTHORITY, RESPONDENT.

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 17th day of September, one thousand nine hundred and eighty-two.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the respondent, Federal Labor Relations Authority,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED. Judge James L. Oakes dissenting.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. DANIEL FUSARO,
Clerk

/S/ FRANCIS X. GINDHARDT
Chief Deputy Clerk

APPENDIX D

7 FLRA No. 69

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL RELATIONS AUTHORITY
WASHINGTON, D.C.

Case No. 1-CA-334

DIVISION OF MILITARY AND NAVAL AFFAIRS
STATE OF NEW YORK (ALBANY, NEW YORK)
RESPONDENT

and

NEW YORK STATE COUNCIL OF ASSOCIATION
OF CIVILIAN TECHNICIANS, INC.
CHARGING PARTY

DECISION AND ORDER[1]

This matter is before the Authority pursuant to the Regional Director's "Order Transferring Case To The Federal Labor Relations Authority" in accordance with section 2429.1 of the Authority's Rules and Regulations (5 CFR 2429.1(a)).

Upon consideration of the entire record of this case, including the parties' stipulation of facts, accompanying exhibits, briefs submitted by the Respondent and the General Counsel, and *amicus curiae* briefs filed by National Federation of Employees and National Association of Government Employees, the Authority finds:

The complaint herein alleges that the Respondent violated section 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute)

[1] The National Federation of Federal Employees and the National Association of Government Employees were granted permission to participate in this preceding as *amici curiae* pursuant to section 2429.9 of the Authority's Rules and Regulations.

based on its refusal to authorize travel and per diem expenses for employees serving as members of the Union's negotiating committee in noncompliance with section 7131(a) of the Statute. The Respondent admits that as section 7131(a) is presently interpreted,[2] its refusal to authorize travel of per diem expenses violates the Statute. However, the Respondent urges that such precedent be reversed on the ground that Section 7131(a) of the Statute contains no express provision granting the Authority the power to order payment of travel and per diem expenses.[3] Thus, it argues that the Authority exceeded its power by the position it established in *Interpretation and Guidance, supra.* In addition, it contends that it cannot be required to make any payment out of appropriated funds absent a statutory basis for such a payment.

Contract negotiation sessions between the parties herein were conducted on November 5 and 6, 1979, and

[2] *Interpretation and Guidance*, 2 FLRA 264 (1979). Subsequently, the Authority issued *Bureau of Alcohol, Tobacco and Firearms, Western Region, Department of the Treasury, San Francisco, California*, 4 FLRA No. 40 (1980), *appeal docketed*, No. 80-7673 (9th Cir. Nov. 28, 1980) and *U.S. Department of Agriculture, Science and Education Administration, Agricultural Research, North Central Region, Dakotas-Alaska Area*, 6 FLRA No. 45 (1981), *appeal docketed*, No. 81-1948 (8th Cir. Sept. 4, 1981). *See also, Florida National Guard*, 5 FLRA No. 49 (1981), *appeal docketed*, No. 81-5466 (5th Cir. May 18, 1981).

[3] Section 7131. Official time

(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

April 14, 1980. Employees Fred Young, John Hernon, Jerry Brennan, Charles McNab and Richard Pauze represented the Union at the November 5 and 6, 1979, meetings with five management representatives. No requests for payment of travel or per diem expenses were made. Employees Young and Hernon represented the Union at the April 14, 1980, negotiating session. Specific requests for travel and per diem expenses were made by Young and Hernon and denied by the Respondent.

The Authority has considered the Respondent's arguments that the precedent, note 1, *supra*, be reversed. As the Respondent has made no arguments which were not previously considered, and no new basis has been advanced to persuade the Authority to reverse those cases, the Respondent's position is rejected.

The Authority determined in *Interpretation and Guidance*, *supra*, and subsequent cases (note 1, *supra*), based upon an analysis of the Statute and the legislative history of section 7131, that any employee who is on official time under section 7131 while representing an exclusive representative in the negotiation of a collective bargaining agreement is entitled to payment from agencies for travel and per diem expenses.[4] Therefore, the Authority concludes that the Respondent violated section 7116(a)(1) and (8) when it refused to authorize payment of requested travel and per diem expenses to employees Young and Hernon while they were on official time, on April 14, 1980, representing the Union in the negotiation of the collective bargaining agreement. Accordingly, the Authority shall order that

[4] The *amicus curiae* briefs support generally the Authority's interpretation of the Statute noting particularly that an employee on official time is on "official business," as required for the payment of travel and per diem expenses. (Briefs of the National Federation of Federal Employees and the National Association of Government Employees, at 3 and 9, respectively).

the violative conduct be remedied by requiring payment of properly documented travel and per diem expenses to the above-noted members of the Union's negotiating team and to any other employee who submits a properly documented voucher for payment of travel and per diem expenses related to participation on official time as the designated Union representative in contract negotiations subsequent to April 14, 1980.

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Statute, the Authority hereby orders that the Division of Miliary and Naval Affairs, State of New York, (Albany, New York) shall:

1. Cease and desist from:

(a) Failing and refusing to provide payment of properly documented travel and per diem expenses incurred by Fred Young, John Hernon, or any other employee, as a result of their participation on official time under section 7131(a) of the Statute as duly designated representatives of the New York State Council of Association of Civilian Technicians, Inc., the employees' exclusive representative, in scheduled contract negotiation sessions.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Provide payment to employees Fred Young and John Hernon based upon their previously submitted vouchers for their travel and per diem expenses incurred as the result of their participation on official time under section 7131(a) of the Statute as the duly designated representatives of the New York State Council of Association of Civilian Technicians, Inc., for

the contract negotiation session conducted April 14, 1980.

(b) Provide payment to any other employee who submits a properly documented voucher for travel and per diem expenses incurred as the result of participation on official time under section 7131(a) of the Statute in contract negotiations, as a duly designated representative of the New York State Council of Association of Civilian Technicians, Inc.

(c) Post at its facilities located throughout the State of New York copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Adjutant General and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Adjutant General shall take reasonable steps to insure that said notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region I, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., December 29, 1981

/s/ RONALD W. HAUGHTON,
Chairman

/s/ HENRY B. FRAZIER III,
Member

/s/ LEON B. APPLEWHAITE,
Member

Federal Labor Relations Authority

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE
THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE
LABOR-MANAGEMENT RELATIONS
WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to provide payment of properly documented travel and per diem expenses incurred by Fred Young, John Hernon, or any other employee as a result of their participation on official time under section 7131(a) of the Statute as duly designated representatives of the New York State Council of Association of Civilian Technicians, Inc., the employees' exclusive representative, in scheduled contract negotiations.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights as assured by the Statute.

WE WILL provide payment to employees Fred Young and John Hernon, based upon their previously submitted vouchers, for their travel and per diem expenses incurred as the result of their participation on official time under section 7131(a) of the Statute as the duly designated representatives of the New York State Council of Association of Civilian Technicians, Inc., for the contract negotiation session conducted April 14, 1980.

WE WILL provide payment to any other employee who submits a properly documented voucher for travel and per diem expenses incurred as the result of participation in contract negotiations on official time under

section 7131(a) of the Statute as a duly designated representative of the New York State Council of Association of Civilian Technicians, Inc.

_____
(Agency and Activity)

Dated:_____ By:_____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice, or compliance with its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority, Region I, whose address is: 441 Stuart Street, 9th Floor, Boston, Massachusetts, 02116, and whose telephone number is (617) 223-0920.

APPENDIX E

2 FLRA No. 31

UNITED STATES
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C. 20424

Case Nos. O-PS-3 and O-PS-6

INTERPRETATION AND GUIDANCE

As previously announced,[1] the Authority determined, in conformity with its rules and regulations and the Federal Service Labor-Management Relations Statute (92 Stat. 1191), that an interpretation of the Statute was warranted on the following:

1) Whether employees who are on official time under section 7131 of the Statute while representing an exclusive representative in the negotiation of a collective bargaining agreement are entitled to payments from agencies for their travel and per diem expenses.

2) Whether the official time provisions of section 7131(a) of the Statute encompass all negotiations between an exclusive representative and an agency, regardless of whether such negotiations pertain to the negotiation or renegotiation of a basic collective bargaining agreement.

Concurrently, the Authority invited interested persons to express their views in writing with respect to the above matters, including the impact, if any, of section 7135(a)(1) of the Statute (92 Stat. 1215) on these matters. The responses submitted to the Au-

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[1] Federal Labor Relations Authority, *Notice Relating to Official Time*, 44 Fed. Reg. 42,788 (July 20, 1979).

thority were most thorough and helpful and have been carefully considered. In view of the depth and scope of these submissions, the Authority has determined that no useful purpose would be served by providing for an oral presentation of views.

Section 7131 of the Statute

As indicated above, both matters at issue pertain to section 7131 of the Statute (92 Stat. 1214), which reads as follows:

> § 7131. *Official time*
>
> (a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this [Statute] shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.
>
> (b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a nonduty status.
>
> (c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official

time for such purpose during the time the employee otherwise would be in a duty status.

(d) Except as provided in the preceding subsections of this section—

(1) any employee representing an exclusive representative, or

(2) in connection with any other matter covered by this [Statute], any employee in an appropriate unit represented by an exclusive representative,

shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

We turn to the application of the above-quoted provisions, and particularly section 7131(a), to the matters here in question. For convenience of discussion, we shall consider the questions in reverse order.

Nature of Negotiations to Which Official Time Applies

The second of the two matters at issue is the following:

> Whether the official time provisions of section 7131(a) of the Statute encompass all negotiations between an exclusive representative and an agency, regardless of whether such negotiations pertain to the negotiation or renegotiation of a basic collective bargaining agreement.

Section 7131(a) expressly states in relevant part that "[a]ny employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this [Statute] shall be authorized official

time for such purposes, including attendance at impasse proceeding[s]." This section thus provides that when an exclusive representative and an agency undertake the negotiation of a "collective bargaining agreement," an employee representing the exclusive representative in that undertaking must be authorized official time for such purposes.

In this connection, the phrase "collective bargaining agreement" in section 7131(a) is defined at section 7103(a)(8) (92 Stat. 1193), as follows:

> (8) "collective bargaining agreement" means an agreement entered into as a result of collective bargaining pursuant to the provisions of this [Statute].

The phrase, "collective bargaining," in turn, is defined in section 7103(a)(12) (92 Stat. 1194) as follows:

> (12) "collective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession[.]

It is apparent from the specific language in these definitions that a "collective bargaining agreement" is any agreement that is entered into as a result of the

performance of the mutual obligation of the parties to bargain in a good-faith effort to reach agreement with respect to conditions of employment affecting employees in the appropriate unit. Consequently, the language reflects the intent of Congress that the entitlement of official time under section 7131(a) would encompass all negotiations between an exclusive representative and an agency, regardless of whether such negotiations pertain to the negotiation or renegotiation of a basic collective bargaining agreement.

Such conclusion as to the intent of Congress is supported by the legislative history of section 7131(a) of the Statute. More particularly, section 7131(a) is identical to section 7132(a) of the Bill (H.R. 11280) reported to the House by the House Post Office and Civil Service Committee.[2] In adopting the provisions in section 7132(a) of the House Bill, Congress rejected the relevant language in section 7232 of the Bill (S. 2640) reported to the Senate by the Senate Governmental Affairs Committee.[3] That section of the

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[2] *See* H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 288 (1978).

[3] Section 7232 of the Senate Bill provided:

> Solicitation of membership or dues and other internal business of a labor organization shall be conducted during the nonduty hours of the employees concerned. Employees who represent a recognized labor organization shall not be on official time when negotiating an agreement with agency management, except that the negotiating parties may agree to arrangements which provide that the agency will authorize a reasonable number of such employees (not normally in excess of the number of management representatives) to negotiate on official time for up to 40 hours, or up to one-half the time spent in negotiations during regular working hours.

Senate Bill had sought, in effect, to maintain the restrictions imposed upon the use of official time for negotiations by employees representing unions as established in E.O. 11491, as amended.

Significantly, as to section 7232 of the Senate Bill, the Senate Committee Report had stated that it applied "to the negotiation or renewal of a *basic* collective bargaining agreement, *as opposed* to negotiations which arise out of circumstances during the term of the basic agreement" (emphasis added).[4] The House Bill which was adopted by Congress contains wholly different provisions on the relevant subject of official time, and there is no indication whatsoever that Congress intended to limit the use of official time to the negotiation of basic agreements as contemplated by the rejected language of the Senate Bill.

Thus, the legislative history demonstrates that Congress intended, consistent with the specific language of section 7131(a) and the related definitions in section 7103(a)(8) and (12), that the entitlement of official time under section 7131(a) would apply whenever the parties undertake the negotiation of a collective bargaining agreement.

Apart from the literal language and legislative history of section 7131(a) of the Statute, the conclusion that Congress intended that official time apply to the negotiation of any collective bargaining agreement is supported by the express findings and purpose of the Statute as stated in section 7101(a), namely, that "labor organizations and collective bargaining in the civil service are in the public interest." Certainly, it would implement the ends of collective bargaining to

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[4] S. Rep. No. 95-969, 95th Cong., 2d Sess. 112 (1978).

sanction official time for all negotiations between an exclusive representative and an agency, regardless of whether such negotiations pertain to the negotiation or renegotiation of a basic collective bargaining agreement. For only in such manner may effective union representation comparable to the representation of management be achieved under the Statute, and only in this manner may both parties effectively fulfill their respective obligations under section 7114(b) of the Statute (92 Stat. 1202) "to meet at reasonable times . . . as frequently as may be necessary" for good-faith negotiations on conditions of employment of the unit employees.

Accordingly, for the reasons stated above, it is concluded that the official time provisions of section 7131(a) of the Statute encompass all negotiations between an exclusive representative and an agency, regardless of whether such negotiations pertain to the negotiation or renegotiation of a basic collective bargaining agreement.

Entitlement of Employees on Official Time to Travel and Per Diem Expenses

As mentioned at the outset, the other matter here at issue is the following:

> Whether employees who are on official time under section 7131 of the Statute while representing an exclusive representative in the negotiation of a collective bargaining agreement are entitled to payments from agencies for their travel and per diem expenses.

On this issue it is clear from the Statute that employees who are on official time under section 7131 while representing an exclusive representative in the

negotiation of a collective bargaining agreement are entitled to payments from agencies for their travel and per diem expenses.

As previously set forth, section 7131(a), which is principally here involved, provides that an employee representing an exclusive representative in the negotiation of a collective bargaining agreement shall be on official time "during the time the employee otherwise would be in a duty status." As explained in the House Report, an employee serving as a union representative is authorized "paid time" while engaging in the negotiation activities provided for in section 7131 (a) of the Statute.[5] Hence, while an employee is on official time representing an exclusive representative in the negotiation of a collective bargaining agreement, that employee is on paid time entitled to his or her usual compensation and is not in leave status.

Neither the Statute, nor its legislative history, expressly adverts to the payment of travel expenses or per diem during participation in these negotiation activities.[6] However, it is well established that such

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[5] H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 58 (1978).

[6] Under section 20 of E.O. 11491, as amended, travel expenditures were not authorized for union representatives engaged in negotiation activities (*Labor-Management Relations in the Federal Service* (1975) at 58). However, as previously indicated, Congress substantially rejected section 7232 of the Senate Bill which sought in effect to maintain the language of the Order. Moreover, unlike under section 20 of the Order which strictly limited the amount of official time which might be authorized for negotiation activities by union representatives, section 7131(a) of the Statute contains no such limitation. Further, unlike under the Order, the encouragement of collective bargaining is a stated purpose of the Statute.

expenses are authorized when an employee "is engaged on official business for the Government" (Chapter 57, Subchapter I—*Travel and Subsistence Expenses; Mileage Allowances*, 5 U.S.C. § 5701, *et seq.*). As already mentioned, Congress, in adopting the Statute, specifically found in section 7101(a) that collective bargaining "contributes to the effective conduct of public business," and that "collective bargaining in the civil service [is] in the public interest." Further, Congress expressly mandated in sections 7114 and 7116(a)(5) and (b)(5) that such negotiations be conducted in good faith by the parties involved (92 Stat. 1202, 1204). Thus, an employee, while negotiating a collective bargaining agreement as a union representative and while on paid time entitled to his or her usual compensation and not in a leave status, is clearly engaged on "official business for the Government."

Additionally, it is not controverted that management representatives are uniformly paid travel expenses and per diem when engaged in the negotiation of a collective bargaining agreement on behalf of management, and Congress indicated its intent that similar prerogatives be accorded employees serving as union representatives likewise engaged in the negotiation of a collective bargaining agreement. In this connection, Representative Clay, in discussing the proscription of official time for employees engaged in internal union business under section 7132(b) of the House Bill (which was enacted as section 7131(b) of the Statute) stated as follows: [7]

> Section 7132(b) of the Udall compromise bars the use of official time for conducting the internal

[7] 124 Cong. Rec. H9,638 (daily ed. Sept. 13, 1978).

> business of a labor organization. . . . Activities that involve labor-management contacts are not included in this section. . . . Title VII imposes heavy responsibilities on labor organizations and on agency management. These organizations should be allowed official time to carry out their statutory representational activities *just as* management uses official time to carry out its responsibilities. [Emphasis added.]

The payment of travel and per diem expenses would not only more nearly equate the status of union and management negotiators as contemplated by Congress, but would also facilitate more effective union representation at the bargaining table, thereby implementing the purpose of the Statute, as reflected in section 7101(a), to encourage collective bargaining in the Federal sector.

Finally, it should be noted that section 7131(c) of the Statute, identical as here relevant to section 7131(a), provides that:

> (c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority *shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.* [Emphasis added.]

The Authority has previously interpreted this language of the Statute in section 2429.13 of its Interim Rules and Regulations, as entitling the employee on such official time to transportation and per diem expenses (44 Fed. Reg. 44771 (July 30, 1979)). No persuasive reason has been advanced for a contrary

interpretation of the analogous language in section 7131(a) of the Statute, and no supported challenge has been advanced regarding the legality of the Authority's prior interpretation of the same critical language in section 7131(c).

In summary, any employee who is on official time under section 7131 of the Statute while representing an exclusive representative in the negotiation of a collective bargaining agreement is entitled to payments from agencies for their duty time and travel and per diem expenses.

Impact of Savings Provisions in the Statute

Lastly, the question as to the impact, if any, of the savings provisions in section 7135(a)(1) of the Statute on the above matters must be considered.[8] More specifically, the question is whether provisions in existing agreements which are more restrictive than section 7131(a) on the granting of official time, as well as the payment of travel and per diem expenses, for employees representing a union in the negotiation of a collective bargaining agreement, remain operative under section 7135(a)(1) of the Statute.

Section 7135(a) reads in relevant part as follows:

> (a) Nothing contained in this [Statute] shall preclude—
>
> (1) the renewal or continuation of . . . a lawful agreement between an agency and an exclusive

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[8] The savings clause in section 7135(b) of the Statute (92 Stat. 1215) is clearly without impact, since the provisions of section 7131(a), which are here involved, are completely different from the related provisions in section 20 of E.O. 11491, as amended, and section 7131(a) thereby "supersedes" the "policies, regulations, and procedures established under" the Executive Order.

> representative of its employees, which is entered into before the effective date of this [Statute][.]

By this express language of section 7135(a)(1), nothing in the Statute precludes the parties to a lawful agreement in existence on January 11, 1979, the effective date of the Statute, from mutually renewing or continuing the terms of that agreement if they so desire. Thus, for example, if the provisions of an existing agreement limit the authorization of official time to employee representatives of a union in the negotiation of a basic collective bargaining agreement, nothing in the Statute precludes the parties to such an existing agreement, if they wish, from mutually renewing or continuing the terms of that agreement.

However, where a labor organization or an agency objects to the continuation or renewal of a provision relating to official time more restrictive than section 7131(a), such objection prevents the continuation or renewal of the agreement provision under section 7135(a)(1) of the Statute. In that situation, the provisions of section 7131(a) would be immediately operative. That is, any employee representing an exclusive representative in the negotiation of a collective bargaining agreement would be entitled to official time, regardless of whether such negotiations pertain to the negotiation or renegotiation of a basic collective bargaining agreement, and any employee on such official time under section 7131(a) of the Statute would be entitled to payments from the agency for their travel and per diem expenses.

Conclusion

It is the Authority's interpretation and guidance that:

1. The official time provisions of section 7131(a) of the Statute encompass negotiations between an exclu-

sive representative and an agency, regardless of whether such negotiations pertain to the negotiation or renegotiation of a basic collective bargaining agreement.

2. Employees who are on official time under section 7131 of the Statute while representing an exclusive representative in the negotiation of a collective bargaining agreement are entitled to payments from agencies for their duty time and travel and per diem expenses.

3. Provisions in agreements existing on January 11, 1979, the effective date of the Statute, which are more restrictive than section 7131(a) of the Statute on the granting of official time, as well as the payment of travel and per diem expenses, for employees representing a union in the negotiation of a collective bargaining agreement may be renewed or continued if the parties so desire, under section 7135(a)(1) of the Statute. However, if either party to such provisions in an existing agreement objects to the continuation or renewal thereof, such objection prevents the continuation or renewal of those agreement provisions under section 7135(a)(1) of the Statute.

Issued, Washington, D.C., December 19, 1979.

/s/ Ronald W. Haughton
RONALD W. HAUGHTON, Chairman

/s/ Henry B. Frazier III
HENRY B. FRAZIER III, Member

/s/ Leon B. Applewhaite
LEON B. APPLEWHAITE, Member

FEDERAL LABOR RELATIONS
AUTHORITY

Supreme Court, U.S.
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JAN 21 1983
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No. 82-1021

In the Supreme Court of the United States

OCTOBER TERM, 1982

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

DIVISION OF MILITARY AND NAVAL AFFAIRS, STATE OF NEW YORK, AND DEPARTMENT OF DEFENSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioner contends that Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. (Supp. V) 7131(a), requires that a federal agency pay a per diem allowance and travel expenses to employee union representatives engaged in collective bargaining with the agency.

The New York National Guard is a state militia that is federally administered by the National Guard Bureau of the Department of Defense. See 10 U.S.C. 3015. National Guard technicians are employed to meet the day-to-day administrative, training, and logistical needs of the Guard (Pet. App. 3a). Under the National Guard Technicians Act of 1968, 32 U.S.C. (& Supp. V) 709, Guard technicians were converted to the status of federal civilian employees of the Department of Defense, although administration of the Guard program was retained by the various state adjutants general.

On two occasions, in November 1979 and April 1980, five National Guard technicians traveled to Albany, New York, from other locations in the State to participate as union negotiators in collective bargaining with respondent New York National Guard, also known as the Division of Military and Naval Affairs. The Guard granted these employees time off from their usual duties, but denied a request that it pay the employees' travel expenses and per diem (Pet. App. 3a). The New York State Council of Association of Civilian Technicians, Inc., the union that the employees represented, filed an unfair labor practice charge with petitioner, the Federal Labor Relations Authority. Petitioner determined (*id.* at 17a-21a) that the Guard had committed an unfair labor practice and ordered it to pay the disputed expenses. Petitioner based its order on its belief that the Civil Service Reform Act of 1978, 5 U.S.C. (Supp. V) 7131(a), requires a federal agency to pay travel expenses and per diem allowances to employee union representatives engaged in collective bargaining with the agency.

On petition for review of that decision, the court of appeals concluded (Pet. App. 1a-7a) that deference to petitioner's interpretation of the statute was inappropriate and that petitioner had interpreted Section 7131(a) incorrectly. Therefore, the court refused to enforce petitioner's order. The court of appeals noted (Pet. App. 5a n.3) that its decision was in direct conflict with the decision of the Ninth Circuit in *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 672 F.2d 732 (1982), cert. granted, No. 82-799 (Jan. 17, 1983).

In *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, *supra*, the FLRA ordered the BATF to pay travel expenses and a per diem allowance to an employee union representative who had engaged in collective bargaining with BATF. The Ninth Circuit enforced that order, holding that the

FLRA's interpretation of the Civil Service Reform Act of 1978, 5 U.S.C. (Supp. V) 7131(a), is correct. Thus, *Bureau of Alcohol, Tobacco and Firearms* presents the same issue that is raised in this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be held and disposed of in light of the decision in *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, No. 82-799.[1]

REX E. LEE
Solicitor General

JANUARY 1983

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[1]Petitioner also has filed a petition for a writ of certiorari in another case in which the Eighth Circuit refused to enforce petitioner's order that a federal agency pay travel expenses and per diem of employee union representatives. *United States Department of Agriculture* v. *FLRA*, 691 F.2d 1242 (1982), petition for cert. pending, No. 82-979 (filed Dec. 13, 1982). We recently asked the Court to hold the petition in No. 82-979 for disposition in light of the decision in *Bureau of Alcohol, Tobacco and Firearms*, v. *FLRA*, No. 82-799.